

# 2021 ANTITRUST HORIZONS: LETTING GO WHILE HOLDING ON TO HOPE



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The severe economic crisis resulting from the COVID-19 pandemic required that antitrust authorities worldwide revise parameters and views that guided their performance during the past few decades, and imposed on us the need for procedures and guidelines to be expanded and strengthened amid oversimplified and immediate solutions to the crisis. It is time we double our bets that competition law can contribute to make it easier to understand economic phenomena and, particularly, the means to handle its more complex recent dilemmas. To which prospects should the antitrust community turn itself this year? It is hard to say it, but we must learn from what is already in front of us: our global and globalized case law, which has succeeded in solving most of the dilemmas we tackle in our daily work as adjudicators; not to mention competition law researchers and scholars everywhere, who truly make up the institutional memory of our century-old antitrust laws — and who, therefore, are the most apt to help renew and expand it.

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Rather than perspectives, horizons to be explored and broaden. Rather than expectations, new frontiers to be crossed and secured. Competition Law will most definitely face a wide range of possibilities and emergencies in 2021. Some issues will remain as others arise. The severe economic crisis resulting from the COVID-19 pandemic required that antitrust authorities worldwide revise parameters and views that guided their performance during the past few decades, and imposed on us the need for procedures and guidelines to be expanded and strengthened amid oversimplified and immediate solutions to the crisis.

The unexpected impact caused by the pandemic and the measures taken to prevent it from spreading have deeply influenced the functioning of whole markets and economies. Globally, antitrust authorities that had been enforcing their laws in the past decade in a context of stable economic growth had to adapt their enforcement practices not only due to the challenges caused by blockages, but, more importantly, they had to adjust to collapsing markets or markets of essential goods which experienced serious scarcity, in a context of great economic depression, in which many companies were facing rigorous liquidity restrictions or possible bankruptcy.

Antitrust authorities have faced these drastic circumstances by altering their enforcement priorities, allowing certain types of cooperation/collaboration, loosening their efficiency patterns, adopting emergency procedures, allowing government support under certain conditions, and approving mergers and acquisitions given that the target had suddenly turned into a bankrupt or insolvent company. Concurrently, antitrust agencies have constantly emphasized, with all available means and policies, that said changes would mean neither a weakening nor a substantial shift in the basic principles of competition laws that had been previously followed.

CADE's performance, like those of other authorities, was deeply affected by the issues faced by countries, companies and individuals throughout 2020. Thus, CADE had to seek ways to lessen the main and most severe internal and external effects of the crisis, always based on the premise of promptly promoting a competitive environment as healthy as possible in all sectors under our scrutiny, and also throughout the Brazilian economic recovery in the medium and long terms.

Therefore, it is always a delicate balance between renewal and continuity – which needs to be continuously addressed – that drives all public policies in Brazil and abroad. However, in exceptional circumstances, the fundamentals of government intervention in the economy must be examined more carefully, including regarding the interpretation and enforcement of competition laws. What should remain the same and what should be changed need to be defined based on technical criteria, considering the expertise acquired by individuals and institutions. The remedy prescribed to patients must heal them completely and with minimum collateral effects.

The Government, in Brazil and abroad, should weigh in their interference in the economic sphere. Measures taken without proper consideration or which excessively weaken established standards may, under certain circumstances, cause more harm and end up worsening the situation instead of resolving it. As it is said in English, we should never tolerate that the baby be thrown out with the bathwater.

Hence, within their jurisdiction and capabilities, and safeguarding traditional methodologies and review parameters, antitrust authorities need to be allowed freedom and creativity, of course always having parsimony and self-restraint, to find solutions that are feasible, proportional, easy to monitor, quick to implement, and, especially, ones that properly address the competition issues they are intended to solve.

In this regard, I believe antitrust authorities worldwide will be called to action more often than ever in 2021, to put their experience and expertise to good use. We must be prepared to contribute as we can to the economic agenda of our countries by asserting and showing that the answer to the crisis caused by the pandemic is ensuring free competition. Additionally, we need to show that unreasonable, disproportionate or poorly planned economic interventions would wreak havoc in markets that are already so battered. We must be sure to make it clear that only by further exploring some lessons and established models of antitrust law we will be able to rebuild the structures that have deteriorated during the long period of low economic activity and, of course, build new foundations that the crisis proved to be necessary and urgent. It is time we double our bets that competitions law can contribute to make it easier to understand economic phenomena and, particularly, the means to handle its more complex recent dilemmas.

Of course, I speak from CADE's perspective, from our experience with competition laws in Brazil, especially how they have been understood and enforced in the country in the past decades. Still, I believe worldwide we have some converging answers and goals to be achieved in 2021 and beyond: letting go of old ways in order to explore new solutions to new problems, while keeping in mind that we can always resort to established principles to deal with notorious issues. In order to reach beyond 2021, I believe it is essential that, in 2021, we have clarity regarding what it means "going beyond." To do that, it is important that antitrust authorities are heard and consulted about the processes involved in the

economic revival and that the traits and characteristics that can make it lasting are thought over. In that sense, nothing lasts longer than establishing structural and behavioral conditions that foster effective competition in different economic sectors, as antitrust experience has shown us.

Our economies, and companies and people, can only recover, especially in developing countries – which inherently have stricter limits on their capacity to invest and obtain funds – if all available means are used properly and in a coordinated manner. To this extent I believe antitrust law, in Brazil and worldwide, can contribute more if we consider its century-old journey: since its origin and throughout its international consolidation, amongst the public policies related to the economy, antitrust has always placed much importance in the technical structuring of a system of institutions and rules aimed at creating incentives and sanctions to foster desired competition practices through decisions and agreements. Moreover, in general, it is essential and perhaps undeniable that, for a remedy to be effective, the measures adopted should involve a range of national and international authorities and agencies, in accordance with its historic role as a mediator between law and economic matters.

Therefore, competition law is unique in its procedures and intentions and, at the same time, is an element that comprehends concerns of all sorts. The worldwide crisis caused by the pandemic made it clear that, when faced with new and old issues, antitrust law needs to take into consideration its own experiences. Letting go while keeping our hopes up, with new lessons and inherited standards, in 2021 antitrust authorities have a lot to develop and contribute to a legacy that will live beyond 2021.

Thus, the Brazilian experience with collaboration/cooperation amongst competitors, which is directly related to its international occurrences, is one of these means and policies of antitrust law that simultaneously and similarly can be considered innovative and conservative, and are good amulets of this in-between place we are at where we must let go and hold on at the same time, and the current antitrust context full of possibilities and perspectives which are obviously primordial for competition authorities to have the ability to handle, understand, and, when deemed necessary, intervene in economic matters.

In cases of extended and overall crises, such as the current one caused by the COVID-19 pandemic, economic agents usually seek to define methods and protocols for collaboration/cooperation between them to overcome serious imbalances and instabilities and preserve their ability to carry on their activities. However, even though these agreements may be beneficial during the crisis, if certain conditions and safeguards are not in place, they may result in potential competition problems along the road in Brazil and abroad. The agreements herein considered are those that establish means of collaboration/cooperation amongst competing companies in a same market. They are adopted in an emergency as a provisional measure, aimed at overcoming adversities resulting from an extensive, non-sectoral crisis, and at mitigating the main immediate effects of the crisis to protect competition in affected sectors.

According to the principle of free competition, economic agents should compete amongst themselves while carrying out their commercial activities, while antitrust authorities, on the other hand, must protect competition and punish harmful conducts. Thus, collaboration/cooperation amongst two or more agents implicate considerable advantages that give cooperating companies more market power while impairing businesses that did not have the same opportunity or privilege. In specific cases, however, a collaboration/cooperation amongst competitors may have a positive effect by ensuring greater efficiency in the distribution of products and services of the economic sectors granted this opportunity. It is, by nature, economic concentration, or, in other words, a practice to be investigated. However, considering the devastating impact of the pandemic and other similar situations, we should be open to discuss the possibility of resorting to it on occasion.

Given this scenario, on May 28, 2020, upon an application for collaboration/cooperation from competing companies (proceeding 08700.002395/2020-51), CADE decided to clear the creation of the project “Movimento NÓS.” The agency established guidelines, boundaries, procedures and binding review patterns for the matter in similar discussions. At the time, it was mentioned that the economic agents intending to collaborate/cooperate during the crisis in good faith, should not forget the advisable opportunity to report such agreements to CADE for proper review, even though their reporting is not mandatory.<sup>2</sup>

Furthermore, it was indicated at the time that the companies involved should be aware of possible competition issues that could arise from their agreement could cause. Thus, the companies should take adequate measures to enter risk-free agreements and avoid possible future investigations of antitrust violations by CADE a result of their cooperation.

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2 Public version available at: [https://sei.cade.gov.br/sei/controlador.php?acao=procedimento\\_trabalhar&acao\\_origem=protocolo\\_pesquisa\\_rapida&id\\_protocolo=816783&infra\\_sistema=100000100&infra\\_unidade\\_atual=110000955&infra\\_hash=81c6fcb4b1126752e12cf258cd29f03dba5b77e1825ebe73bfe876ae5f698266](https://sei.cade.gov.br/sei/controlador.php?acao=procedimento_trabalhar&acao_origem=protocolo_pesquisa_rapida&id_protocolo=816783&infra_sistema=100000100&infra_unidade_atual=110000955&infra_hash=81c6fcb4b1126752e12cf258cd29f03dba5b77e1825ebe73bfe876ae5f698266).

Moreover, the agency stressed it was not about less strict rules, but a different kind of assessment. We have, thus, made it clear that the Brazilian competition authority will not refrain from addressing competition concerns in its reviews of cooperation agreements/collaboration amongst competitors, even in times of crises; but it will review them with different metrics and procedures. Thus, it cannot be said these (or any other cases) reviewed by the authority are not subject to competition regulation. In order to properly explore the available horizons and opportunities related to this matter, it is important that we clarify the main aspects of the case to understand its unfolding and how CADE reviews this kind of request.

When submitted to the agency for a review of possible competition effects, these requests are filed as a simple Petition as they do not fulfil the conditions for mandatory reporting nor fall within the scope of a merger or acquisition, a typical agreement amongst competitors, or any other possibility foreseen in Law 12529 or in the Statutes of CADE.

Next, the Office of the Superintendent General of CADE evaluates the potential of the cooperation agreement/collaboration amongst competitors result in anticompetitive effects and issues an opinion suggesting that it be granted or not. Finally, the case is forwarded to the agency's Administrative Tribunal, which assesses it and takes the appropriate measures.

The Tribunal, taking into account what is available in the records and the opinion issued by the Office of the Superintendent General, will grant the request if it is considered that the cooperation agreement/collaboration amongst competitors fulfils the requirements to be reviewed by the agency and if the matters of fact and the law ensure the request is in accordance with competition laws and does not have the potential to negatively affect competition.

There is no time limit for these requests established by law or the Statutes of the CADE, but as they are considered urgent requests, we try to review them as priority issues and on an emergency basis. Both the Office of the Superintendent General and the Tribunal know crises require faster decisions, made on technical grounds; most of all, they should be reviewed timely and in accordance with other requests the agency receive which are heard without delay. In this particular case, the request was received, reviewed by the Office of the Superintendent General, submitted to the Tribunal, and heard within 15 days.

On May 19, 2020, the companies AMBEV, BRF, Coca-Cola, Mondelez, Nestlé, and Pepsico filed a Memorandum of Understanding ("MoU," or "Agreement") with CADE, which was signed within the scope of the Small Trade Activity Recover ("STAR Project") on May 11, 2020, and resulted in the so-called "*Movimento NÓS*."

The COVID-19 pandemic led many commercial and service establishments to temporarily stop their activities as a measure to prevent the disease from spreading. These measures had a severe economic impact on small and medium retailers — which in Brazil are a significant part of the distribution channels for consumer goods such as food, beverages, health care products, and household goods — therefore threatening their own existence.

With the prospect of a prolonged crisis and considering the very nature of the activities carried out by small retailers in the country, we noticed isolated actions could not effectively support these establishments in restarting their economic activities, thus the need for a business coalition with this purpose.

These were the main reasons behind our decision to clear project *Movimento NÓS*, which included some competition safeguards we had established: i) companies' individual actions would not bear results; ii) the business coalition should be time-limited; iii) potential time limit extensions are dependent on the pandemic, and CADE had to be previously notified to consider such requests; iv) in conducting their business activities, the companies should not interact, in the strict sense, but rather conduct such activities individually; and vi) the actions developed by the coalition are pro-competitive and pro-efficiency and, above all, could not be adopted by any of these companies alone.

On June 4, 2020, after adjudication, the Tribunal reached a unanimous decision. They i) chose to examine the request, although the coalition did not fall within the scope of any of the transactions listed in our laws nor did it require previous reporting; ii) ratified the opinion issued by the Office of the Superintendent General concluded, in summary, that the agreement was economically justifiable; iii) concluded the parties adopted protocols to prevent antitrust concerns; iv) saw no indications of anticompetitive practices resulting from, or connected to, the coalition; v) preserved the right to review its position on the coalition if faced with any evidence of anticompetitive practices; and vi) observed the companies showed concern about re-establishing competitiveness and normality in the sector.



Therefore, according to CADE's case law, in examining this kind of request, the agency considers i) the exceptional circumstances faced by the companies, ii) the urgency of the matter, iii) the causal link between the crisis and the intended cooperation, iv) the time limit; and v) the efficiencies produced by the agreement and their benefits to consumers.

Moreover, to ensure requests for cooperation/collaboration amongst competitors are properly received and considered by the agency, it is crucial they include the following: vi) all information and documents required for the Office of the Superintendent General and the Tribunal to review the case (at the moment of the filing); and vii) proof they can be quickly implemented/reverted, and that they are feasible/executable, monitorable, economically reasonable, and proportional to the problems they confront.

Furthermore, as a result of such decision and in order to support companies in filing this type of request, CADE published on its website on July 6, 2020 the Provisional Informative Note on Collaboration amongst Companies to Face the COVID-19 Crisis, in which the agency explains these collaborations in terms of their parameters, scope, time limits, main procedures involved, and other relevant information to help companies have confidence in these agreements and better understand their contours. Thus, CADE has succeeded in gathering tools, rules, and procedures to respond promptly and efficiently to struggling companies in the pandemic and post-crisis period.<sup>3</sup>

The briefly-described Brazilian rules for cooperation/collaboration among competitors are merely an illustration of the beneficial shift I believe is representative of competition law in 2021: in order to remain active — appropriately — competition authorities need to be sufficiently detached so as to better propose inventive and adequate solutions to the current and, especially, unpredictable problems that will stem from the COVID-19 pandemic; and to shield the hope and faith that these institutions are capable of properly responding to these issues as they have done for over a century.

Competition law, with its unique parameters, procedures, value, and techniques can surely offer sound responses to ensure that, in the medium and long run, antitrust authorities' actions produce long-lasting benefits to the majority of a country's population. Thus, it is not desirable or legitimate that, confronted with an opaque and scarcely predictable future, we abandon it as a tool to mediate the relationship between law and economics. What the delicate future of competition law as a public policy holds in store for Brazil and the world requires us to be open, in the sense developed in this text, in this in-between place where we must let go while holding on to hope, simultaneously dealing with innovation and conservatism, while navigating profoundly complex and broad matters. These expectations can only be explored and fulfilled by not dedicating ourselves completely to either of them and actually nourishing this in-between place.

Of course, competition law (nationally and internationally) will have its eyes on a series of cases and markets in 2021. To name a few topics CADE and other competition authorities will be paying attention to: in the digital economy sector, issues such as open banking; 5G's arrival in the Brazilian mobile telephony market; the enforcement of the Brazilian General Personal Data Protection Law (Law 13709/2018); reviews related to large mergers and acquisitions scheduled for the first half of 2021, which involve several sectors significant for the country's economy; as well as the ongoing discussions on the criteria for penalties related to administrative proceedings or the criteria of convenience and enforceability in CADE's successful agreement policies. Nonetheless, I believe rather than being reduced to a few high-priority topics, 2021 will be a year for us to strengthen our conviction about the importance of competition for long-term national development and to once more assert the maturity of this system in Brazil. This will only become true if we are not too attached to our old ways and let go of what does not serve us anymore with courage and keeping our hopes up.

It is with high hopes for the future of competition law that I head towards the end of this text. What is in store for antitrust in 2021? To which prospects should the antitrust community turn itself this year? It is hard for me to say it, but we must learn from what is already in front of us: our global and globalized case law, which has succeeded in solving most of the dilemmas we tackle in our daily work as adjudicators; not to mention competition law researchers and scholars everywhere, who truly make up the institutional memory of our century-old antitrust laws—and who, therefore, are the most apt to help renew and expand it. What we do today has, of course, immediate consequences, but above all it is part of an inheritance we leave for those who will come after us. This inheritance is, mainly, courage, hope, and trust in competition law. Against this background, the prospects of antitrust are endless, as they always move forward and are always redefined; they are unfinished and, hence, can forever develop, evolve, improve.

<sup>3</sup> Available at: <http://www.cade.gov.br/noticias/cade-divulga-nota-informativa-sobre-colaboracao-entre-concorrentes-para-enfrentamento-da-crise-de-covid-19/nota-informativa-temporaria-sobre-colaboracao-entre-empresas-para-enfrentamento-da-crise-de-covid-19.pdf>.

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